



Montana Association of Counties

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Commissioner of Political Practices Jeff Mangan
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Commissioner Mangan:

The Montana Association of Counties (MACo) requests your assistance in further clarifying rules related to the creation and registration of political committees in Montana. Specifically, we request a determination that educational outreach and traditional election related activities conducted by governmental entities, necessary for the conduct of local elections and instrumental in providing the information necessary for an informed electorate, does not make a *government* a registered *political committee*.

COPP has the discretion to require registration of an "incidental political committee" if a "person" makes an "electioneering communication" per MCA [13-1-101 15 \(a\) \(iii\)](#). Pursuant to MCA 2-2-121(3), a public officer or employee may not "use public time, facilities, equipment, supplies, personnel, or funds to solicit support for or opposition to any political committee", the nomination or election of any person to a public office, or the passage of a ballot issue..."

The full text of [2-2-121 \(3\) MCA](#):

(a) Except as provided in subsection (3)(b), a public officer or public employee may not use public time, facilities, equipment, supplies, personnel, or funds to solicit support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue unless the use is:

(i) authorized by law; or

(ii) properly incidental to another activity required or authorized by law, such as the function of an elected public officer, the officer's staff, or the legislative staff in the normal course of duties.

(b) As used in this subsection (3), "properly incidental to another activity required or authorized by law" does not include any activities related to solicitation of support for or opposition to the nomination or election of a person to public office or political committees organized to support or oppose a candidate or candidates for public office. With respect to ballot issues, properly incidental activities are restricted to:

(i) the activities of a public officer, the public officer's staff, or legislative staff related to determining the impact of passage or failure of a ballot issue on state or local government operations;

13-37-225, "Reports of Contributions and Expenditures Required", compels the reporting of contributions and expenditures on behalf of a candidate or political committee, and (3) states, "A person who makes an election communication, electioneering communication, or independent expenditure is subject to reporting and disclosing requirements as provided in chapters 35 and 37 of this title."

Under MCA Section 13-1-101(28), a "person" is defined as "an individual, corporation, association, firm, partnership, cooperative, committee, including a political committee, club, union, or other organization or group of individuals or candidate as defined in subsection (8)." This definition explicitly applies to all of MCA Title 13. It does not include a public employee acting on behalf of a political subdivision or governmental entity.

13-1-101(33) does provide a definition of "Political Subdivision" to mean "a county, consolidated municipal-county government, municipality, special purpose district, or any other unit of government, except school districts, having authority to hold an election." If political subdivisions were intended to be included in the definition of "person" as it relates to Title 13, it would have been included in the definition of "person" and not three (3) subject lines later. And if a political subdivision is NOT a person, it cannot be required to report as a political committee under current law.

When the COPP determines that bond information provided to the general public is an "electioneering communication" it may require the creation of an incidental committee (defined by 13-1-101 (22) (a): "Incidental committee" means a political committee that is not specifically organized or operating for the primary purpose of supporting or opposing candidates or ballot issues but that may incidentally become a political committee by receiving a contribution or making an expenditure.) Public officers and employees are prohibited from using public funds to support any political committee, yet it is the expenditure of public funds, for educational purposes, that prompted the COPP to require a public entity to register as a political committee. As 2-2-121 (3) (b) (i) indicates above, determining the impact of passage or failure of a ballot issue on local government operations is a regular and normal activity, and assumedly requires staff time and public resources. Conducting authorized activities related to education and outreach should not require the creation of a political committee and then registration with Political Practices.

Because elections are an essential responsibility of County government, information related to upcoming elections, mail ballot elections, special district elections, school elections, polling place information, or generalized information related to voter registration and voting must be effectively communicated to county residents. We argue it is a "regular or normal communication by a local government" as contemplated in the exclusion section of the current Administrative Rules in 44.11.605. Posting a sample ballot on a county web site or publishing a sample ballot in a local newspaper takes county time and resources, and falls under the definition of "electioneering communication." Purchasing and printing ballots is an incidental expenditure because a ballot clearly falls under the definition of an "electioneering expenditure". Under the statutory definition of "election communication" found in 13-1-101 (14), the legislature included a provision that an election communication DOES NOT MEAN an "activity or communication for the purpose of encouraging individuals to register to vote or to vote..." However, no such exception exists under "electioneering communication" in sub 15. COPP has used public entity expenditures on "electioneering communications" to trigger the creation of a political committee on an inconsistent basis in the past, and the proposed rule modification neither clarifies the rule nor the type of activities that trigger registration and reporting. "Any other communication may be subject to reporting" is not clarity.

Communicating the impacts of the passage or failure of a levy or bond election to jurisdictional residents is a responsibility of every local government submitting the question to their voters. It is a regular and normal communication by a local government. It is often done by direct mailing to registered voters in order to have the

greatest impact with limited public resources. Yet when COPP determines that outreach and education efforts trigger registration as a political committee, it confuses the message and the role of the messenger. Sending absentee ballots by a county elections administrator, to more than 100 recipients, would also be considered an “electioneering communication” and once a county is required to register as a political committee, many of the functions of the elections office would be reportable activities. When the Secretary of State uses public time, facilities, equipment, supplies, personnel, and funds to produce and distribute the annual general election Voter Information Pamphlet, they are engaging in an electioneering communication. And if the registration rules are to be applied evenly to governmental entities, the Secretary of State should be compelled to create a political committee, appoint a treasurer, open a separate bank account, and report the expenditures related to Secretary of State activities in every election cycle. We don’t think that was the intent of the statutory framework that interweaves election communications, electioneering communications, political committee registration requirements, and incidental committee reporting requirements. Neither did previous COPP’s, because the current rules contain a specific exemption for the Voter Information Pamphlet under 44.11.605 (3) (c). And neither, apparently, does the Montana Legislature.

[HB 401](#) as introduced by Representative Skees in the 2017 session was an attempt to require reporting of political subdivision ballot issue/election expenditures. It failed to pass the legislature, but was a specific attempt to make an election communication, an electioneering communication, or an independent expenditure made by local governments reportable to COPP. Interestingly, the legislation DID NOT include a political committee registration requirement. The legislation was intended to simply require the expenditure to be reported, not the creation of a political committee because of an education-related expenditure. The legislature was not aware that current practices of the COPP go far beyond simply reporting expenditures, and include the political committee creation and reporting requirement. Likely because the registration and reporting requirements have been inconsistently applied in the recent past. Had the legislature been aware, there would have been no need to introduce this legislation.

Even if you disagree that local governments are excluded from the registration requirement because of the statutory definitions explained above, the law already allows the COPP to determine that legitimate governmental education and outreach efforts do not constitute an electioneering communication. [13-1-101 \(15\)\(b\)\(v\)](#) contains an exclusion provision that allows COPP to determine what is not an electioneering communication; *a communication that the commissioner determines by rule is not an electioneering communication*. That authority has been appropriately exercised by excluding the Voter Information Pamphlet, a clear electioneering communication, from the reporting requirements. Because local government entities are specifically prohibited from supporting political committees with public funds, and the creation of a political committee can be required by COPP when a person engages in an electioneering communication, we ask that you determine **by rule** that ***educational outreach, the distribution of election-related information, and other traditional election-related activities conducted by governmental entities that do not promote or oppose any ballot issue or candidate are not electioneering communications***. Local governments have all the requirements in place to report expenditures, through public meetings, public budgeting, public review of vendor claims, and meaningful public participation in deliberative processes. Even reporting certain types of expenditures would be acceptable. It is the registration requirement, converting education and outreach or essential election-conducting activities into political committee activities, that we find objectionable.

Sincerely,

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Eric Bryson
Deputy Director – Montana Association of Counties